94-1368

NO.

Supreme Court, U.S.
FEB 9 1995

In the Supreme Court of the United States

OCTOBER TERM, 1994

FIDELITY & CASUALTY COMPANY OF NEW YORK,
Petitioner

VERSUS

LARRY DEAN SAMPSELL,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the General Maritime Law permits a maritime employer's liability carrier to take a credit for state workers' compensation benefits paid to an injured worker ultimately determined to be a seaman and to suspend maintenance benefits until the overpayment is amortized at a proper rate of maintenance.

PARTIES TO THE PROCEEDING

The parties before the Court are petitioner Fidelity & Casualty Company of New York (F&CCNY) and respondent Larry Dean Sampsell. The parties to the proceeding below were F&CCNY, F&CCNY's insured B & I Welding Services & Consultants, Inc. (B & I Welding), and Larry Dean Sampsell. B & I Welding's interests in regard to this petition are aligned with those of F&CCNY.

RULE 29.1 LISTING

The parent company of petitioner Fidelity & Casualty Company of New York is Continental Corporation. Continental Corporation was recently purchased by CNA Financial Corporation.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

FIDELITY & CASUALTY COMPANY OF NEW YORK,
Petitioner

VERSUS

LARRY DEAN SAMPSELL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

Fidelity & Casualty Company of New York respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of Louisiana, Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeal of Louisiana, Fourth Circuit (App., *infra*, A-1 - A-11) is reported at 638 So. 2d 477. The judgment of the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana (App., *infra*, A-12 - A-13) is unreported.

JURISDICTION

The judgment of the Court of Appeal of Louisiana, Fourth Circuit, was entered on June 15, 1994 (App., *infra*,

A-1). The Court of Appeal denied a timely petition for rehearing *en banc* on July 19, 1994 (App., *infra*, A-14). On November 11, 1994, the Supreme Court of Louisiana denied a timely petition for a writ of certiorari or review (App., *infra*. A-15 - A-16).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Respondent Larry Dean Sampsell filed suit under the Jones Act and General Maritime Law against his employer B & I Welding Services & Consultants, Inc. (B & I Welding), against barge owner/operator Offshore Pipelines, Inc. (OPI), and against defendants' insurers on May 4, 1990, in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana. On November 26, 1991, respondent filed a supplemental petition alleging that B & I Welding's workers' compensation and employer's liability carrier Fidelity & Casualty Company of New York (F&CCNY) arbitrarily and capriciously failed to pay maintenance benefits. F&CCNY brought a motion for summary judgment, contending that the benefits previously and timely paid to respondent under the Louisiana Workers' Compensation Act had more than satisfied respondent's maintenance entitlement. The district court granted F&CCNY's motion for summary judgment. The Court of Appeal of Louisiana, Fourth Circuit, reversed, holding that F&CCNY could not offset respondent's right to maintenance by claiming a credit for workers' compensation payments. The Court of Appeal denied F&CCNY's petition for rehearing *en banc*, and the Supreme Court of

Louisiana denied F&CCNY's petition for a writ of certiorari or review.

A. HOW THE FEDERAL QUESTION WAS PRESENTED

Respondent allegedly injured his lower back on July 26, 1989, while working as a welder for B & I Welding. The injury occurred aboard the PIPELINER V, a barge owned and operated by OPI within territorial waters of Louisiana. Petitioner F&CCNY provided workers' compensation and employer's liability coverage to respondent's employer B & I Welding. The policy had a $25,000 limit for claims by members of the crew of a vessel.

Upon notice of the claim, F&CCNY's adjuster verified that respondent was in the course and scope of his employment at the time of his injury, verified wages, and began paying benefits under the Louisiana Workers' Compensation Act. On May 4, 1990, respondent filed suit in state court against B & I Welding, OPI, and their insurers under the Jones Act and General Maritime Law. F&CCNY's adjuster re-evaluated the case and concluded that respondent had been overpaid seamen's maintenance benefits. F&CCNY suspended payment of respondent's maintenance benefits on September 6, 1990. By that time, F&CCNY had paid a total of $15,753 in workers' compensation benefits and all medical expenses.

Respondent filed a supplemental petition on November 26, 1991, alleging that F&CCNY "had unilaterally refused to pay [respondent's] maintenance benefits for a period of time as required by applicable

maritime law." Respondent further alleged that "[t]his refusal to pay maintenance benefits was arbitrary and capricious, thereby subjecting . . . [petitioner] to punitive damages, penalties and attorney's fees." Respondent's supplemental petition raised the question of whether the General Maritime Law permits an insurer to take a credit for state workers' compensation benefits paid to a seaman by suspending maintenance benefits until the overpayment is amortized.

B. PRIOR PROCEEDINGS

F&CCNY filed a motion for summary judgment in the state district court, showing that respondent's maintenance entitlement had been more than satisfied by the workers' compensation benefits it had previously paid. The district court granted F&CCNY's motion for summary judgment.[1] App., *infra*, A-12 - A-13.

Respondent appealed to the Court of Appeal of Louisiana, Fourth Circuit. The Court of Appeal reversed the district court's summary judgment, holding that "[F&CCNY] cannot offset an injured seaman's right to maintenance and cure by claiming credit for workers' compensation payments." App., *infra*, A-3. The Court of Appeal remanded the case for trial on the issue of whether F&CCNY is liable for compensatory or punitive damages

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[1] After the district court granted F&CCNY's motion for summary judgment, respondent settled his claims against OPI. The remainder of respondent's Jones Act claims against B & I Welding and its excess insurers were tried. Respondent was found to be a seaman. The jury found damages in the amount of $799,650. That judgment was settled by B & I Welding's excess insurer.

for withholding maintenance and cure. App., *infra*, A-9 - A-11.

The Court of Appeal held that a credit against an injured seaman's right to maintenance cannot be allowed because maintenance and cure benefits are qualitatively different from workers' compensation benefits. App., *infra*, A-8. The Court of Appeal noted that "[t]here is a marked difference between 'seaman' [sic] and other workers, and between maintenance and cure and other compensation." App., *infra*, A-6. The court stated that

> "[t]he shipowner's liability for maintenance and cure resembles that of an employer subject to a Workmen's Compensation Act only in that it is a liability without fault which is based on the employment relationship. . . . Not only is the shipowner's liability more extensive than liability under any Workmen's Compensation Act, but the right to maintenance and cure is not the seaman's exclusive remedy against his employer . . . ."

App., *infra*, A-7 (quoting Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty*, § 6-6, at 281-2).

The Court of Appeal further noted that the remedy of maintenance and cure is a greater and more ancient right than the remedy of workers' compensation. App., *infra*,, A-8. The court stated that maintenance and cure benefits are granted to provide food and shelter during an injured seaman's cure and are not "substitutes for wages." App., *infra*, A-8 - A-9. The Court of Appeal reasoned that "[r]emedies and procedures under state workers' compensation laws cannot be analogized to maintenance and cure

derived from maritime law." App., *infra*, A-9.

The Court of Appeal concluded that "[t]he trial court erred by holding [F&CCNY] could take an immediate credit for worker's compensation payments and withhold maintenance and cure." App., *infra*, A-9. The Court of Appeal remanded the case for trial on the issue of whether F&CCNY is liable for compensatory or punitive damages. App., *infra*, A-9 - A-11.

The Supreme Court of Louisiana denied F&CCNY's petition for a writ of certiorari or review without written reasons. App., *infra*, A-15 - A-16.

C. JURISDICTION

28 U.S.C. § 1257(a) provides that only "[f]inal judgments or decrees" rendered by the highest court of a state may be reviewed by this Court by writ of certiorari. Although this Court is without jurisdiction to review an interlocutory judgment, this Court has not rigidly construed the principles of finality. *Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), this Court recognized at least four categories of cases in which a decision on a federal issue will be treated as a final judgment for purposes of § 1257, and jurisdiction will be taken without waiting for the completion of additional proceedings anticipated in lower state courts.

This case fits into the first category of cases described by this Court in *Cox*. This category of cases was described as follows:

> In the first category are those cases in which there are further proceedings — even entire trials — yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final.

420 U.S. at 477. In this case, the Court of Appeal has conclusively decided the issue of whether a credit may be taken for state workers' compensation benefits paid to a seaman. Although the case has been remanded for trial on the issue of damages, the outcome of the trial is preordained. F&CCNY will be held liable for compensatory or punitive damages for failure to pay maintenance in addition to workers' compensation. The only question will be the amount of the damage award.

This case also satisfies the two additional factors considered by this Court in *Cox* — that a decision on the merits by this Court could terminate the litigation, and that a failure to decide the question presented now will leave the petitioner in the shadow of a rule of law which is in serious doubt. *See* 420 U.S. at 486. For these reasons, the decision of the Court of Appeal of Louisiana, Fourth Circuit should be deemed a final judgment for purposes of § 1257(a).

REASONS FOR GRANTING THE WRIT

The issue of whether an insurer may take a credit for

state workers' compensation benefits paid to a seaman involves a substantial interpretation of rights under the General Maritime Law and presents an important federal question which should be decided by this Court. Moreover, the decision of the Court of Appeal of Louisiana, Fourth Circuit conflicts with federal jurisprudence, ignores a basic principle of maritime law, and discourages voluntary payment of more generous workers' compensation benefits.

I. The Decision of the Court of Appeal Conflicts With Federal Decisions Permitting an Insurer to Take a Credit for Workers' Compensation Benefits Paid to a Seaman.

The decision of the Court of Appeal holds that an insurer cannot take a credit for workers' compensation benefits paid to an injured worker who is ultimately determined to be a seaman. This decision conflicts with federal decisions permitting insurers to take a credit for both state and federal workers' compensation benefits paid to a seaman.

Federal courts have held that workers' compensation benefits paid to a seaman may be credited against that seaman's recovery under the Jones Act. In *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679-80 (5th Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970), the U. S. Court of Appeals for the Fifth Circuit held that workers' compensation benefits paid to a seaman pursuant to the Longshore & Harbor Workers' Compensation Act (LHWCA) could be credited against items awarded to that seaman under the Jones Act. The court in *Massey* reasoned that

> since the payments [under the LHWCA] were made directly on behalf of the employer pursuant to a statutory scheme whose purpose it is to compensate at least to a degree the pecuniary loss as sustained by an employee from an injury received in the course of his work, we think it fair in the confusion of these ambiguous-amphibious controversies, to require, not a repayment as such, but rather a credit against those items of damages ultimately allowed that bear a reasonable relation to the items of loss compensated by workmen's compensation benefits.

Id. (citations omitted). The court in *Massey* listed the items against which a credit should be allowed as follows: "(a) the ultimate award for maintenance and cure, (b) the pecuniary loss of wages during the period of payment of the compensation benefits, and (c) medical-hospital payments incurred up to the date of payment under the Compensation Act." *Id.* at 680. The court stated that a credit would not be allowed for pain and suffering and loss of earning capacity. *Id.*

The decision of the Fifth Circuit in *Massey* has been followed by the U. S. District Court for the Southern District of Texas, the U. S. District Court for the Western District of Washington, and the U. S. District Court for the Western District of Pennsylvania. *See Ditmore v. Fairfield Indus., Inc.*, 855 F. Supp. 187, 189 (S.D. Tex. 1994) (holding that if employer pays workers' compensation benefits to injured worker ultimately determined to be seaman, employer can receive credit against Jones Act settlement or judgment); *Miron v. All Alaskan Seafoods, Inc.*, 705 F.

Supp. 518, 519 (W.D. Wash. 1988) (holding that vessel owner is entitled to credit for amount it paid seaman in state workers' compensation benefits against award seaman receives under Jones Act); *Cheuvront v. Pittsburgh & L.E.R.*, 477 F. Supp. 193, 197 (W.D. Pa. 1979) (holding that plaintiff's entitlement to maintenance and cure under Jones Act must be reduced by amount of benefits paid to plaintiff under LHWCA).

Prior to the Fifth Circuit's decision in *Massey*, the U. S. District Court for the Eastern District of Louisiana had also held that an employer is entitled to a credit for state workers' compensation benefits paid to a plaintiff later determined to be a seaman. *See Williams v. Offshore Co.*, 216 F. Supp. 98, 100 (E.D. La. 1963); *Wascom v. Employers' Mut. Liab. Ins. Co.*, 204 F. Supp. 723, 725 (E.D. La. 1962).

The decision of the Louisiana Court of Appeal herein conflicts with federal jurisprudence from the Fifth Circuit and several district courts. This Court should grant F&CCNY's petition to resolve the conflict.

II. The Decision of the Court of Appeal is Erroneous Because it Allows Double Recovery of Benefits for the Same Injury and Imposes a Duty Upon Insurers to Manage a Seaman's Finances.

The decision of the Court of Appeal is erroneous because it allows double recovery of benefits for the same injury. Double recovery is not allowed under the General Maritime Law. *See, e.g., Fitzgerald v. United States*

Lines, 374 U.S. 16, 19 n.6 (1963) (noting that duplication of recoveries should be avoided); *Ditmore*, 885 F. Supp. at 189 (stating that injured maritime workers are not allowed to recover twice for same injury — once under federal maritime law and again under state workers' compensation plans). Yet, the rule of law set forth by the Louisiana Court of Appeal provides that an insurer cannot be credited for any amounts paid as workers' compensation benefits to a worker who is ultimately found to be a seaman. Read literally, this rule may require an insurer to pay both workers' compensation benefits and maintenance benefits. To allow a worker to collect both workers' compensation and maintenance benefits is to allow double recovery. *See Williams*, 216 F. Supp. at 100.

The decision of the Court of Appeal is also erroneous because it effectively imposes a duty upon insurers to manage or budget a seaman's finances during his cure. No such duty is now known in the law, nor should it exist. Although seamen have traditionally been considered wards of the court, *see Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 529 (1938), they should not be deemed incompetent to handle their own affairs, especially when recuperating in or near their hometown in the United States and not in a foreign, unfamiliar port. Neither a maritime employer nor its insurer should be required to pay beyond its contractual obligation to pay maintenance and cure simply because a seaman may have mismanaged or overspent benefits unknowingly paid to him in advance. Longshoremen are held to that standard of prudence. *See, e.g., Stevedoring Servs. of Am., Inc. v. Eggert*, 953 F.2d 552, 556 (9th Cir.) (stating that 33 U.S.C. § 914(j) "aims at reimbursing an employer for the amount of its *advance*

payments, where these payments were too generous, for however long this takes, out of *unpaid* compensation found to be due"), *cert. denied*, 112 S.Ct. 3056 (1992).

The Court of Appeal committed error by ignoring a basic principle of maritime law and by imposing a duty upon insurers and employers that does not now exist in the law. This Court should grant certiorari to correct these errors.

III. The Decision of the Court of Appeal Discourages Voluntary Payment of Workers' Compensation Benefits.

The decision of the Court of Appeal holds that an insurer cannot offset an injured seaman's right to maintenance by claiming a credit for workers' compensation payments. This decision penalizes insurers in cases in which an injured worker's status is not readily determinable by causing insurers to lose money they cannot recover and by subjecting insurers to damages for failure to pay lower benefits in the form of maintenance and cure. The effect of the decision will be to discourage voluntary payment of workers' compensation benefits in cases in which an injured worker's status is uncertain.

In this case, respondent's status was uncertain at the time of his injury. F&CCNY's adjuster chose to pay higher workers' compensation benefits rather than lower maintenance benefits. This resulted in an overpayment of benefits to respondent. F&CCNY took a credit for this overpayment by suspending respondent's maintenance benefits until the overpayment was amortized at a proper

rate of maintenance. The Court of Appeal characterized this action as evasive of F&CCNY's duty to pay maintenance and cure. App., *infra*, A-9. The court further stated that F&CCNY would be liable for compensatory or punitive damages for failure to pay maintenance and cure. App., *infra*, A-9.

An insurer who overpays benefits to a seaman should be permitted to take a credit and to suspend benefits, if necessary, until the overpayment is amortized. The Court of Appeal's decision to the contrary requires insurance adjusters to predict, at their peril, the eventual outcome of a close question of legal status. If an adjuster decides to pay workers' compensation benefits and the injured worker is later found to be a seaman, the insurer will lose money it can never recover. Moveover, if the insurer attempts to take a credit for the workers' compensation benefits it has paid, it will be liable for compensatory or punitive damages for failure to pay maintenance and cure. As a result, in cases in which an injured worker's status is uncertain, insurers will be forced to pay maintenance benefits to protect themselves from punitive financial loss.

Whether the General Maritime Law permits an insurer to take a credit for state workers' compensation benefits paid to a seaman is an important federal question which has not yet been, but should be, squarely addressed and decided by this Court. The decision of the Court of Appeal of Louisiana, Fourth Circuit conflicts with federal jurisprudence and ignores a basic principle of maritime law. Maritime matters require national uniformity from which individual state courts should not be allowed to stray. It is the federal jurisprudence that should be fol-

lowed. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215-17 (1917).

CONCLUSION

For the foregoing reasons, this Court should grant F&CCNY's petition for writ of certiorari.

RESPECTFULLY SUBMITTED,

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APPENDIX A

LARRY SAMPSELL	**NO. 93-CA-2456**
VERSUS	**COURT OF APPEAL**
B&I WELDING SERVICES AND CONSULTANTS, INC., ET AL	**FOURTH CIRCUIT**
	STATE OF LOUISIANA

AN APPEAL FROM
THE 25th JUDICIAL DISTRICT COURT,
PLAQUEMINES PARISH
NO. 34-004, DIVISION "A",
HONORABLE MICHAEL E. KIRBY, JUDGE

* * * * * *

CHARLES R. WARD
JUDGE

* * * * * *

JUN 15 1994

(Court composed of Judge Robert J. Klees and Judge Charles R. Ward and Judge Steven R. Plotkin)

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REVERSED AND REMANDED

93CA2456.OP3

Larry Sampsell appeals from a summary judgment dismissing his claims against his former employer, B&I Welding Services and Consultants, Inc., and its insurer, Fidelity Casualty Company of New York. Mr. Sampsell claims Fidelity wrongfully denied him maintenance and cure benefits which he claims were due to him as an injured seaman. He also claims Fidelity wrongfully delayed approval of surgery for his injured back.

The trial court held that Fidelity could offset Sampsell's claims for maintenance with the payments it made to him for worker's compensation. The trial court also denied Sampsell's claim for damages because of the alleged delay in approving surgery.

We reverse. Fidelity cannot offset an injured seaman's right to maintenance and cure by claiming credit for workers' compensation payments. We also find Fidelity's delay of seven months before approval of surgery raises contested issues of fact which means that summary judgment is not appropriate.

On July 26, 1989, while employed as a welder with B&I, and while working on an offshore barge, Sampsell injured his lower back. Fidelity assumed that Sampsell was entitled to workers' compensation as a welder, and promptly began compensation payments. Fidelity also timely authorized the first surgery, a lumbar laminectomy.

On May 4, 1990, Sampsell filed suit against B&I, claiming that he was a seaman within the meaning of the Jones Act and General Maritime Law. Immediately after

he filed suit, B&I's insurer, Fidelity examined its records and found that the payments Fidelity had made for worker's compensation exceeded those that would be due to Sampsell for maintenance and cure if he were indeed a seaman. Fidelity then unilaterally credited the workers' compensation payments against payments of maintenance and cure and did not pay maintenance and cure until the credit was exhausted, eleven months later. As a consequence, Sampsell allegedly suffered devastating economic hardship resulting in the loss of his home and many personal possessions, as well as occasioning mental and physical suffering which allegedly delayed recuperation from his injury and treatments.

Sampsell then filed a supplemental petition on November 26, 1991, alleging that Fidelity and B&I arbitrarily and capriciously terminated his seaman's benefits of maintenance and cure. In addition, Sampsell alleges that a second back surgery was necessary, and although it was ultimately approved by Fidelity, he claims the seven month delay before approval was an arbitrary and capricious handling of his claim for cure. Sampsell's Jones Act claims are not part of this appeal, and the questions raised herein relate only to his supplemental petition and the trial court's summary judgment on those issues.

"Appellate courts review summary judgments de novo under the same criteria that govern the district court's consideration of whether summary judgment is appropriate." *Schroeder v. Board of Supervisors of Louisiana State University, et al.*, 591 So. 2d 342, 345 (La. 1991), *rehearing denied*, (1992).

Fidelity and B&I argue summary judgment is appropriate because an immediate credit was due to them for the workers' compensation payments, relying on the workers' compensation cases of *Ferrand v. D.H.L. Co.*, 614 So. 2d 350, 354 (La. App. 4th Cir. 1993), and *Breaux v. Petro-Drive, Inc.*, 534 So. 2d 48 (La. App. 3rd Cir. 1988). Both allow an employer to take an immediate credit and to deduct overpayment of workers' compensation benefits to an employee before making further payments. Fidelity and B&I also rely on cases under the Longshoreman and Harbor Workers' Compensation Act to support their position, in particular *Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552 (9th Cir. 1992), *cert. denied*, 112 S.Ct. 3056 (1992), which allows reimbursement of overgenerous payments of claims under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C.A. § 914(j).

It is not at all certain, however, that an employer has a right to an *immediate* credit against an injured employee's future compensation for voluntary overpayment it has made, even under the LHWCA. In considering the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C.A. § 914 (j), the United States Court of Appeals for the Ninth Circuit noted, "Ultimately, this section does not provide an employer with a right of repayment for allegedly overpayment of compensation." *Stevedoring Services of America, Inc.*, 953 F.2d at 556. The Fifth Circuit further clarifies that Congress, in enacting the statute, intended that "an injured worker receive regular compensation, even [if it is] later determined to have been wrongly exacted and [is] not recoverable by the payer, [rather] than that he be left without assistance until all amounts are finally determined." *Henry v. Gentry Plumbing & Heating*

Co., 704 F.2d 863, 865 (5th Cir. 1983). In *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679-80 (5th Cir. 1969), *cert. den.*, 90 S.Ct. 682 (1990), *on remand*, 317 F. Supp. 37 (1970), the Fifth Circuit held that even where an employer was entitled to a credit for repayment of benefits mistakenly made to a seaman under the LHWCA, when it was actually liable to him under the Jones Act, the credit could not come as repayment, but would rather have to be taken against damage items which were ultimately awarded the seaman and reasonably related to the LHWCA—compensated items of loss. Also, 33 U.S.C.A. § 922, allows an employer to recover overpayment of compensation "pursuant to a compensation order under the LHWCA." *Stevedoring*, 953 F.2d at 557. The case before us involves no such "order." In sum, Fidelity's reliance on decisions applicable to the LHWCA as analogous is not persuasive authority to justify taking an immediate set-off.

Most importantly, neither the Louisiana Worker's Compensation Act nor the LHWCA Act apply to this case. Fidelity and B&I argue that there can be no reason to distinguish compensation payment from maintenance and cure, and that it is irrational to permit a credit in one instance but not in another "simply because the injured worker might have a connection to a vessel and be labeled [a] 'seaman.' " We disagree. It is precisely for this reason that such a credit against an injured seaman's right to maintenance cannot be allowed.

There is a marked difference between "seaman" and other workers, and between maintenance and cure and other compensation, as the following cases show.

The seaman's right to maintenance and cure for illness or injury occurring while he is in the service of the ship is often analogized to workmen's compensation .... Th[is] analogy ... is on the whole misleading. The theory of compensation was to substitute for a tort action based on negligence the remedy of a compensatory award, determined by an administrative agency, without regard to the employer's fault or negligence. Since the compensation statutes made the award the workman's exclusive remedy against his employer, there was a mutual give and take: the workman gave up the chance of a large verdict from a sympathetic jury but received the certainty of some compensation; the employer gave up the chance of escaping liability altogether and agreed to pay something whenever any of his employees was injured in the course of his employment.

The shipowner's liability for maintenance and cure resembles that of an employer subject to a Workmen's Compensation Act only in that it is a liability without fault which is based on the employment relationship. The shipowner's liability is not restricted to injury or illness 'arising out of' or causally related to seaman's shipboard duties;...the shipowner is liable for any injury which occurs or any illness which manifests itself while the seaman is under articles. Not only is the shipowner's liability more extensive than liability under any Workmen's Compensation Act, but the right to maintenance and cure is not the seaman's exclusive remedy against his employer: he may also recover damages for negligence under the

> Jones Act or for breach of the duty to provide a seaworthy ship. Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty,* § 6-6, at 281-2.

The seaman's remedy of maintenance and cure, as opposed to the non-seaman's remedy of worker's compensation, has been accurately characterized as "a greater right, a more ancient right and the most sacred right ever afforded men of labor." *Sims v. Marine Catering Service, Inc.,* 217 F.Supp. 511, 517 (E.D.La. 1963). A shipowner's or employer's duty to provide its injured seamen maintenance and cure is "[a]mong the most pervasive incidents of the responsibility anciently imposed upon a shipowner ...," *Aguilar v. Standard Oil Co.,* 318 U.S. 724, 730, 63 S.Ct. 930, 933, 87 L.Ed. 1107 (1943). Traditionally, the scope of maintenance and cure has been, "to provide a seaman with food and lodging when he becomes sick or injured in the ship's service;...until he reaches maximum medical recovery [maximum cure]." *Vaughan v. Atkinson,* 369 U.S. 527, 531, 82 S.Ct. 997, 1000, *reh. den.,* 370 U.S. 965, 82 S. Ct. 1578 (1962); *Davis v. Odeco, Inc.,* 18 F.3d 1237, 1245, 1246 (5th Cir. 1994), rehearing denied. "[Maintenance and cure] was intended to assure [the injured seaman] three meals a day and a bed in which to sleep during his treatment and convalescence." *Manchack v. S/S Overseas Progress,* 524 F.2d 918, 919 (5th Cir. 1975) quoting *McCarthy v. American Eastern Corporation,* 175 F.2d 727 (3rd Cir. 1949), *cert. den.,* 338 U.S.911, 70 S.Ct. 349 (1950).

We conclude that maintenance and cure benefits are qualitatively different from workers' compensation, granted for the purpose of providing food and shelter to injured seaman while he recovers from injuries. They are not

substitutes for wages while injured. Remedies and procedures under state workers' compensation laws cannot be analogized to maintenance and cure derived from maritime law. Given the nature of seamen, Courts in admiralty liberally interpret this duty to pay maintenance "for the benefit and protection of the seamen who are its wards." *Hudspeth v. Atlantic & Gulf Stevedores, Inc.*, 266 F.Supp. 937, 941 (E.D.La. 1967); *Calmar Steamship Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993 (1938), *reh. den.*, 59 S. Ct. 56 (1938). Fidelity cannot use prior workers compensation payments to evade a duty to pay maintenance and cure during Sampsell's recovery. The trial court erred by holding Fidelity could take an immediate credit for worker's compensation payments and withhold maintenance and cure.

Nevertheless this does not mean that Sampell himself is entitled to a summary judgment, as it appears he argues. There remain unresolved issues of fact as to whether Fidelity and B&I are liable for compensatory or punitive damages. The Fifth Circuit in *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, 88 (5th Cir. 1984) noted that "punitive damages for the willful and arbitrary refusal to pay maintenance are available under general maritime law." There may be varying degrees of damages that may be awarded a seaman for his employer's breach of the maintenance and cure duty:

> If the shipowner, in failing to pay maintenance and cure, has not only been unreasonable but has been more egregiously at fault he will be liable for punitive damages and attorney's fees....[T]here is an escalating scale of

> liability: a shipowner who...has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. If the shipowner has refused [payment] without a reasonable defense, he becomes liable in addition for compensatory damages. If the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well. *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987).

Moreover, ["i]f an unreasonable failure to provide maintenance and cure aggravates the seaman's condition, his employer is liable not only for the increased medical expenses and maintenance that may become necessary, but also for the full tort damages that result." *Parker v. Texaco, Inc.*, 549 F.Supp. 71, 77 (E.D. La. 1982); *Vaughan v. Atkinson*, supra; *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 53 S.Ct. 173, 77 L.Ed. 368 (1932); *Picou v. American Offshore Fleet, Inc.*, 576 F.2d 585 (5th Cir. 1978).

Thus Fidelity and B&I's liability depends on a factual question of whether Fidelity was reasonable or unreasonable, or willfully callous, arbitrary, and indifferent.

On the issue of whether Fidelity negligently delayed approval of Sampsell's request for a second surgery, there are several issues of material fact in dispute, including whether or not a seven month delay in approving a second surgery was excessive and constituted an arbitrary and capricious handling of Mr. Sampsell's claim. Also in ques-

tion is whether or not the delay occasioned a deterioration in Mr. Sampsell's already impaired physical condition. At the very least, determinations in favor of the moving party were premature. The evidence supporting the summary judgment cannot be said to clearly support the trial court's conclusion. Rather Fidelity and B&I have failed to meet the threshold requirements of this motion by clearly showing an absence of any genuine issue of material fact and that judgment as a matter of law should be theirs.

REVERSED AND REMANDED

APPENDIX B

TWENTY-FIFTH JUDICIAL DISTRICT COURT

PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 34-004 DIVISION "A"

LARRY SAMPSELL

VERSUS

B & I WELDING SERVICES & CONSULTANTS, ET AL

FILED FEB 10 1993 /s/ Julie V. Cole
DEPUTY CLERK

JUDGMENT

This matter came on for hearing on a Motion for Summary Judgment on January 14, 1993.

PRESENT: Russell M. Cornelius, Attorney for Defendant/Plaintiff in Rule, Fidelity & Casualty Company of New York

David Porcieau, Attorney for Plaintiff/Defendant in Rule, Larry Sampsell

The Court considering the argument of counsel and finding the law and the evidence to be in favor of the

parties hereinafter specified now renders the following judgment:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant/plaintiff in rule, Fidelity & Casualty Company of New York and against plaintiff/defendant in rule, Larry Sampsell, granting Fidelity & Casualty Company of New York's Motion for Summary Judgment.

JUDGMENT READ, RENDERED AND SIGNED this 10 day of February, 1993 at Pointe-a-la-Hache, Louisiana.

/s/ Illegible

JUDGE

A TRUE COPY

/s/ Julie V. Cole

Dy. Clerk of Court, Ex-officio Recorder, Etc.
Parish of Plaquemines, La.

APPENDIX C

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, JUL 19 1994

DEAR SIR:

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED

LARRY SAMPSELL v. B & I WELDING SERVICES & CONSULTANTS, INC., ET AL

No. 93-CA-2456

Very Truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX D

THE SUPREME COURT OF THE STATE OF LOUISIANA

LARRY SAMPSELL

VS. NO. 94-C - 2175

B&I WELDING SERVICES
AND CONSULTANTS, INC., ET AL

— — — — — —

IN RE: Fidelity & Casualty Co./NY; - Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Plaquemines 25th Judicial District Court Div. "A" Number 34-004; to the Court of Appeal, Fourth Circuit, Number 93CA-2456

— — — — — —

November 11, 1994

Denied.

PH
PFC
WFM
JLD
JCW
CDK
BJJ

LEMMON, J. not on panel.

Supreme Court of Louisiana
November 11, 1994

/s/ Illegible

Deputy Clerk of Court
For the Court